United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7114 B

P/S

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-7114

STEPHANIE CRAWFORD,

Appellant,

v.

GENERAL ROBERT E. CUSHMAN, JR.
COMMANDANT,
UNITED STATES MARINE CORPS,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

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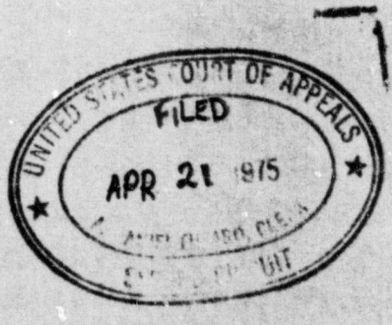

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because she became pregnant. The regulation invoked

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES:

taken short of discharge include "light duty" assignments

Opinion Below

The opinion of the District Court for the District of Vermont, Judge James S. Holden, is reported at 378 F. Supp. 717 (D. Vt. 1974).

Statement of the Issues Presented

Whether involuntary discharge of a servicewoman from the United States Marine Corps, on the sole ground that she is pregnant, and refusal to reinstate her after childbirth, on the sole ground that she has a child under 18 years of age, violate the due precess and equal protection guarantees of the fifth amendment to the United States Constitution.

Regulations Involved

MCO P1900.16 ¶6012, as modified by change 2 of 21 November 1969, provided in pertinent part:

> [T]he Secretary of the Navy, or the Commandant of the Marine Corps, may authorize or direct the discharge or release from active duty of a Marine for the convenience of the Government for any one of the following reasons:
>
> * * * *
>
> A woman member, whether married or unmarried, upon certification by a medical officer that she is pregnant, shall be discharged by her commander, for the convenience of the Government, or in the case of overseas commands, will be transferred to a major Marine Corps command housing Women Marines in the continental United States for discharge. The character of the discharge certificate issued in these cases will be as warranted by the woman member's service record, regardless of her marital status. (App. at 45).

MCO P1100.61B ¶2209 provided in pertinent part:

> Women applicants who have a child or children under 18 years of age are unacceptable for enlistment or reenlistment. The term "child or children" means offspring of the woman herself,

> stepchildren, adopted or foster children. The fact that she has surrendered all rights to custody or control of the child or children through divorce proceedings or through formal adoption does not alter her status of unacceptability for enlistment or reenlistment. (App. at 48).

Statement of the Case

Proceedings below

This action was commenced by appellant Stephanie Crawford on February 23, 1971. The action challenges the constitutionality of Marine Corps regulation MCO P1900.16 ¶6012 (as modified by change 2 of 21 November 1969) which mandates automatic summary discharge of pregnant servicewomen, and MCO P1100.61B ¶2209 which prohibits women who have a child under 18 years of age from enlisting or reenlisting in the Marine Corps. The prayer for relief includes a request for an order directing appellant Crawford's reinstatement in the Marine Corps.

On July 6, 1972, the district court denied appellee Marine Corps Commandant's motions to dismiss for failure to state a claim for relief, for failure to exhaust administrative remedies, and for summary judgment. (App. at 6.)[1/]

1/The citation "App. at __" refers to the Joint Appendix filed herewith.

On March 26, 1973, appellee Marine Corps Commandant's renewed motion for summary judgment was denied. After a full hearing on March 26-27, 1974, the court, on July 12, 1974, dismissed the complaint and entered judgment for appellee on the ground that appellant Stephanie Crawford's "discharge for reason of pregnancy in 1970 and the denial of reenlistment in January, 1971, because she had in her custody a dependent child under 18 years of age, in keeping with regulations in effect on those dates, were constitutionally valid." 378 F. Supp. at 726. (App. at 39.)

On July 22, 1974, appellant Crawford moved for a new trial. By amendment on October 10, 1974, appellant sought a new trial or, in the alternative, an alteration, amendment or vacation of the judgment to take additional testimony for new or additional findings of fact and conclusions of law. The motion was denied on October 29, 1974. Thereafter, on December 29, 1974, notice of appeal was filed.

Statement of Facts

Appellant Stephanie Crawford enlisted in the Marine

Corps[2] on February 5, 1968 for a three year tour of duty which she later extended for an additional year. Her skill level was 0141, clerk typist. She remained in this classification for the duration of her service.

On May 13, 1970, while in service at a California base, appellant Crawford was certified to be about two months pregnant. (Tr. p. 24.) She was summarily discharged on May 27, 1970 pursuant to MCO P1900.16 ¶6012 which provided that a woman Marine who becomes pregnant "shall be discharged by her commander for the convenience of the Government."[3] Appellant later moved to Vermont, and gave birth to a baby girl in December 1970. In January, 1971 she applied to reenlist in the Marine Corps. Her application was rejected on the sole ground that she had a minor

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2/ Women constitute about 2% of active duty Marines - 2,000 out of approximately 310,000 servicemembers. 378 F. Supp. at 721. (App. at 31.)

3/ On March 26, 1971, within ten months of appellant Crawford's peremptory dismissal from service, the mandatory discharge regulation was dropped. In its place a retention request procedure was instituted. See infra at 9-10. (App. at 45, 50, 52.)

child. (Tr. p. 28.)[4/]

The sole ground for appellant Crawford's discharge was her pregnancy. At the time of her discharge, she was in her second month of pregnancy. Her

> medical records indicate nothing to medically prevent her from carrying on her assigned military occupation as late as her seventh month of pregnancy. Her child, at birth, was full term, normal and healthy. The plaintiff made a good recovery and was able to work six weeks after her hospitalization. The disability caused to the [appellant], by reason of her pregnancy, was temporary. 378 F. Supp. at 720. (App. at 30.)

Moreover,

> [a]t the time the [appellant] was released from military service, the only temporary physical disability which was cause for mandatory discharge was that of pregnancy. 378 F. Supp. at 722. (App. at 32.)

[4/] Most reenlistments are extensions of prior enlistments; people who reenlist are usually continuing their status in the military rather than returning to the military after a prolonged civilian period. (Tr. p. 207.) Appellant's rejection for reenlistment is not separately challenged in this appeal because it was a part of the course of events stemming from her unconstitutional discharge. Moreover, government imposed employment-related rules which treat males with minor children differently from similarly situated females are plainly unconstitutional. Weinberger v. Wiesenfeld, 43 U.S.L.W. 4393 (U.S. March 19,1975). Thus, to the extent enlistment applicants with children were subject to different regulation solely on the basis of sex, appellee's rules cannot withstand constitutional review "under any test - compelling state interest, or rational basis or something in between." Stanton v. Stanton, 43 U.S.L.W. 4449 at 4452 (U.S. April 15, 1975).

No individualized determination was made based upon appellant's work performance, proficiency marks or health record. Under the applicable regulation, nothing other than the fact of pregnancy could be considered, for that fact alone triggered mandatory, immediate discharge.

At the time of her discharge, appellant Crawford's duty assignment was office work at El Toro Marine Corps Station in El Toro, California. Her job was sedentary, consisting primarily of typing and filing. (Tr. p. 21.) Twenty months remained in her tour of duty. She had extended her tour of duty for one year in order to transfer to El Toro and was not subject to further reassignment. (Tr. p. 20-21.)

El Toro and seventeen other Marine bases in the United States have day care facilities for the dependent children of service personnel. (Defendant's Answers To Plaintiff's Interrogatory No. 7g; App. at 22.)[5/] Service-

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5/ The trial court's findings that there are no facilities at Marine installations for the care of children of Marine personnel is thus contradicted by the record. In addition, the evidence regarding requirements that female enlisted personnel live in barracks is incomplete. Appellant Crawford moved for a re-opening of the trial in order to present further evidence on this issue, having been precluded at trial from introducing such evidence, and the motion was denied. (Plaintiff's Amended Motion for New Trial, October 10,1974.)

women are transferred to foreign duty stations only at their own request (Tr. p. 34, 188) and are not assigned to combat zones. (Tr. p. 188.) Appellant was prepared to arrange for housing and child care for her child if the Marine Corps did not provide it. (Tr. p. 34.)

Prenatal and postnatal care is available to the wives of male Marines. (Defendant's Answer to Plaintiff's Interrog. 7c; App. at 21.) It was, in fact, provided at Marine Corps expense to appellant and to other service-women discharged for pregnancy. (Tr. pp. 59, 82.)

The Marine Corps has a broad range of procedures for dealing with members who become temporarily disabled. Depending upon the severity of the condition, the member may be excused from many or all of his duties, placed on "light duty," temporarily hospitalized, or placed on temporary convalescent leave. (Tr. pp. 28, 190.)[6/] If appropriate hospital facilities are not available at the member's command location, he is transferred to a base

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6/ While appellant was at El Toro, she broke her leg and was on crutches. She continued to perform all of her job functions, but she was excused from physical exercises and participation in drills and formations. (Tr. p. 22-23, 76.)

which has the necessary facilities. (Answer to Interrog. No. 6(b); App. at 20.) Alcoholics are referred for treatment to a medical or alcoholic rehabilitation center (Tr. p. 193), and in all cases, the member is returned to his regular command as soon as he is able. (See also Defendant's Answer to Plaintiff's Interrog. No. 3; App. at 18.) The court below determined that at the time in question pregnancy was the only temporary disability that occasioned mandatory discharge. 7/ No medical studies regarding the physical abilities of pregnant women were made or relied upon by the Marine Corps prior to promulgation of the regulation singling out pregnancy as cause for peremptory dismissal from service. (Tr. p. 189.)

After appellant's discharge, the applicable regulation underwent significant change. An official bulletin issued on March 26, 1971 by the Department of the Navy Headquarters, United States Marine Corps, announced that all separation policies regarding dependency status, parent-

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7/ Sometimes, but rarely, a member's temporary disability results in discharge, but never mandatorily and only after individualized determination. Examples given at trial include chronic obesity and pseudo folliculitis (a skin disease inhibiting the ability to shave). (Tr. pp. 169-170.)

hood and pregnancy of women officers and enlisted personnel were being reviewed. The applicable policy pending review of the pregnancy discharge regulation, and the resulting regulation promulgated June 28, 1972 (MCO P1900. 16A ¶1612), provided that pregnant servicewomen could request retention, and that "each case will be considered on an individual basis" (quoted in 378 F. Supp. at 722) "each request will be considered on its own merits" (quoted in 378 F. Supp. at 722 n. 5).

At trial, the chief witness for appellee, Brigadier General Edward A. Parnell, was asked why the retention option had not been available to servicewomen in 1970. He responded:

> "I particularly don't see why we didn't have one, No, I don't know, under the circumstances, No." (Tr. p. 198.)

Reasons advanced by appellee Marine Corps Commandant in justification of the mandatory pregnancy discharge rule are administrative convenience (Tr. pp. 167, 172, 200-204) and the needs of military readiness and mobility. (Tr. pp. 167-168, 170-171.) Administrative convenience was explained in terms of "knowing where your people are and their capacity to respond" (Tr. p. 168) and not in terms of paperwork (Tr. pp. 203-204) or lack of appropriate facilities. (Tr. pp. 186, 199.)

Argument

Appellant was discharged from the Marine Corps solely

because she became pregnant. The regulation invoked against her applied automatically. It declared a pregnant woman unfit for service. Concluding that the insurmountable barrier erected by the regulation was consistent with due process and equal protection requirements, and that appellant had no constitutional right to be judged on the basis of her individual capacities, the district court sanctioned summary automatic discharge. 8/

8/ The district court noted that appellant Crawford "offered no objection to her discharge" at the time she was released from military service. 378 F. Supp. at 721. (App. at 31.) Faced with an iron rule compelling her discharge, and surely not counselled by any Marine Corps representative as to her constitutional rights, she was hardly in a position to object. In fact, she did complain about the rule when she enlisted (Tr. p. 214) and on October 20, 1970, a few months after her discharge, she wrote a letter to Marine Corps Commandant Chapman, predecessor of appellee Marine Corps Commandant Cushman, stating: "I ask that my discharge be dropped and changed to transfer to indefinite convalescent leave." (Plaintiff's Exh. No. 3.) Finally, on February 22, 1971, J. Morris Clark, an attorney then representing appellant Crawford, wrote to the Marine Corps Review Board protesting the discharge and requesting that proceedings before the Discharge Review Board be commenced. (Exhibit A attached to Affidavit of Plaintiff's Counsel Regarding Exhaustion of Administrative Remedies.) No response to these letters was received, nor is there any evidence that a response was dispatched to the appellant or to her attorney.

Under the circumstance, appellant Crawford clearly did not waive her right to contest the rule in the only forum in which objection would be meaningful. See Murray v. Vaughn, 300 F. Supp. 688 (D.R.I. 1969) (in an action challenging a selective service reclassification, the court considered and ruled upon plaintiff's prior unconstitutional expulsion from the Peace

The central question in this case is whether the Marine Corps, consistent with fifth amendment due process and the equal protection guarantee inherent in the due process clause, Weinberger v. Wiesenfeld, supra, 43 U.S.L.W. at 4394 n.2, may single out pregnancy as cause for summary mandatory discharge while all other physical conditions occasioning a period of temporary disability are treated on an individualized basis.

Appellant Crawford's equal protection challenge does not rest upon characterization of the pregnancy discharge

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8/ (cont.) Corps which led to the reclassification). Waiver is the "intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458 (1937). See Aetna Ins. Co. v. Kennedy, 301 U.S. 389 (1936), and Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (waiver criteria applicable to civil proceedings). The record here reveals no waiver that is "clear and compelling." Curtis Publishing Co. v. Butts, supra, 388 U.S. at 145. The instant action was begun less than nine months after the discharge and the very month after rejection of appellant's application to reenlist. Cf. Curtis Publishing Co. v. Butts, supra (constitutional challenge was permitted to be raised for the first time on appeal).

Moreover, the court below , when it denied appellee Marine Corps Commandant's threshold motion to dismiss, explicitly rejected the contention that appellant Crawford should have pursued administrative relief before coming to court. (App. at 6.) Because the regulations that confronted appellant Crawford were absolute barriers, allowing no leeway whatever for administrative discretion, any effort to seek relief out of court, before or after her discharge, would have been futile.

regulation as sex discriminatory. Cf. Geduldig v. Aiello, 417 U.S. 484 (1974). Rather her challenge is based upon the irrationality of distinguishing, for service dismissal purposes, between pregnancy and all other physical and mental conditions.

I. The involuntary discharge for pregnancy regulation irrationally singles out pregnancy as the sole physical condition for which automatic discharge is mandated, though pregnancy does not impede ability to function as a servicemember in a manner different from other temporary physical conditions. The regulation is therefore wholly arbitrary.

The challenged regulation singles out pregnant members of the Marine Corps for automatic, involuntary dismissal. The alleged purpose of the regulation is to promote military readiness and mobility. But this purpose is not furthered in a manner consistent with constitutional limitations, for no other temporary physical condition occasions peremptory discharge.

Measured against the alleged readiness and mobility purpose, the pregnancy classification is conspicuously overbroad and, at the same time, patently underinclusive. It marks for mandatory discharge women still fit and able to perform duty assignments, women whose period of disability, when it occurs, may last for only a few weeks. Left for individualized determination are the numerous physical

conditions that may disable more severely, and for a considerably longer period, than pregnancy.

It has been determined in an array of recent authority that pregnancy per se may not be equated with disability. Normal pregnant women are typically fit and able until well into the third trimester. Cleveland Board of Education v. La Fleur, 414 U.S. 632, 645 n.12 (1974); Gilbert v. General Electric Co., 375 F. Supp. 367 (E.D. Va. 1974), appeal pending. See also Green v. Waterford Board of Education, 473 F. 2d 629, 634-635, 636 (2d Cir. 1973). The lower court in the instant case found that appellant was able to carry on her assigned military occupation until her seventh month and was ready to resume work six weeks after delivery. 378 F. Supp. at 720. (App. at 30.) Prior to promulgation and enforcement of the mandatory discharge regulation, however, the Marine Corps made no studies and relied upon none made by others regarding the physical abilities of pregnant women. (Tr. p. 189.)

In sharp contrast to the short period of disability typically experienced by pregnant women, other physical conditions for which automatic discharge is not mandated may be persistent and seriously debilitating. The military response to all other temporary disabilities is individualized. Measures

taken short of discharge include "light duty" assignments, temporary leaves and appropriate treatment. See supra at 8-9; see also Defendant's Answers to Plaintiff's Interrog. Nos. 3, 6(a-f). (App. at 13, 20-26.)[9/] The draconian "cast them out in all events" approach is reserved solely for pregnant women.

Equal protection of the laws requires that legislative classifications "be reasonable, not arbitrary" and "rest upon some ground of difference having a fair and substantial relationship to the object of the regulation so that all persons similarly circumstanced shall be treated alike." Reed v. Reed, 404 U.S. 71, 76 (1971).[10/] As Judge Duniway described the

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9/ Significantly, the trial court found:

> Most complications [of pregnancy] that occur during the first four or five months do not usually require hospitalization. Obstetrical problems that occur late in the term can be serious. However, each patient requires individual treatment. 378 F. Supp. at 720. (App. at 30.)

10/ Quoting with approval the equal protection formulation in F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). Accord, Stanton v. Stanton, supra.

situation, evaluating the involuntary discharge for pregnancy rule once maintained by the Air Force:

> The fact alone of detectable pregnancy mandates discharge. No other temporary physical condition results in mandatory discharge. There is obviously a difference between pregnancy and all other temporary physical conditions. But under Reed, supra, a classification based on that difference is not constitutional unless the difference bears some rational relation to the Government interest served. Is there any evidence that pregnancy has some effect on ability to function [in the military] that is different from any other temporary physical condition? For example, is there any reason to believe that a female [servicemember] who has suffered a fractured leg is better able to perform her job than a female servicemember who is eight days pregnant? The former gets medical leave . . .; the latter is discharged. Why? If this be rational, nothing is irrational! Struck v. Secretary of Defense, 460 F.2d 1372, 1379 (9th Cir. 1972) (dissenting opinion). 11/

11/ See also Robinson v. Rand, 340 F. Supp. 37 (D. Colo. 1972). Certiorari was granted in Struck, 409 U.S. 947 (1972), and petitioner's brief on the merits filed, when the Air Force, at the eleventh hour, apparently perceived the weakness of its position. It ordered Captain Struck's retention in service, whereupon the Supreme Court vacated the judgment of the Ninth Circuit and remanded the case for consideration of "the issue of mootness in light of the position presently asserted by the Government." 409 U.S. 1071 (1972). The Ninth Circuit has not yet decided the mootness issue. Similarly, after a district court determination in its favor, the Air Force decided to switch rather than fight in Gutierrez v. Laird, 346 F. Supp. 289 (D.D.C. 1972), vacated as moot after the Air Force ordered retention of Lt. Gutierrez in service. Unpublished Order, D.C. Cir. February 6, 1973, as amended, May 8, 1973. Thus, the decision below stands alone in upholding a regulation that mandates discharge for pregnancy. See generally Note, 86 Harv. L. Rev. 568 (1973).

II. The involuntary discharge for pregnancy regulation irrebuttably presumes all pregnant servicemembers incapable of and unfit for service. Conclusive presumption of this kind violates the due process clause of the fifth amendment.

The mandatory discharge regulation creates an irrebuttable presumption that pregnant women from the very outset of pregnancy can no longer perform their duties. As appellant Crawford's case demonstrates, this sweeping presumption lacks empirical support. For many months after her discharge, appellant remained able to perform her assigned military occupation. She was fully recovered and able to work six weeks after delivery. 378 F. Supp. at 720.

Irrebuttable presumption that pregnant women are disabled or unfit has been declared incompatible with due process. Cleveland Board of Education v. La Fleur, supra. Although analyzing the issue in a different legal frame, this Court identified as fundamentally unfair a rule that treats all pregnancies alike rather than on a case-by-case basis. Green v. Waterford Board of Education, supra, 473 F. 2d at 634-35, 636. See also Heath v. Westerville Board of Education, 345 F. Supp. 501 at 505 n.2 (S.D. Ohio 1972).

Consistent with its due process approach in La Fleur, the Supreme Court, in a series of cases, has required a more precise fit between the established fact (here: pregnancy) and the "presumed" fact (unfit for service). See, e.g., United States Department of Agriculture v. Murry, 413 U.S. 508 (1973); Vlandis v. Kline, 412 U.S. 411 (1973). See also Stanley v. Illinois, 405 U.S. 645 (1972). Absent exemption of the Marine Corps from constitutional control, the foreclosure mandated by the regulation must be regarded as intolerable, for it relies on a blanket presumption that is factually unjustified. See Pocklington v. Duval County School Board, 345 F. Supp. 163 (M.D. Fla. 1972).

III. Appellee Marine Corps Commandant has shown no justification for summary discharge of pregnant servicewomen or his failure to accord pregnant servicemembers the same individualized treatment accorded all other servicemembers with temporary disabilities.

Challenges to disadvantageous treatment of pregnancy have become familiar fare in federal litigation. E.g., Cleveland Board of Education v. La Fleur, supra; Communications Workers of American v. American Telephone and Telegraph Co., ___F.2d___ (2d Cir.), 43 U.S.L.W. 2406 (March 26, 1975); Green v. Waterford Board of Education, supra. Standard defenses are recited in the parade of cases:

alleged, but never proved, incapacity of all pregnant women, from conception, or at a fixed stage well in advance of term, to perform normal functions; the administrative burden of individualized determinations; concern for the safety of the pregnant woman; and the burden upon the employer in accommodating to the prescence of pregnant women. Defenses of this genre have been raised in this case, as they have been raised in other cases challenging military pregnancy discharge rules. 12/

The Marine Corps' primary justification for the mandatory discharge rule is the maintenance of military readiness and mobility. The district court found:

> [A]ll personnel are expected to respond on short notice and without restriction, to orders that might direct expeditious movement from one location to another. The demands of readiness and mobility are made on all personnel.
>
> . . . . Unscheduled vacancies and replacement transfers in designated skills impose administrative difficulties. 378 F. Supp. at 721. (App. at 31.)

12/ See, e.g., Struck v. Secretary of Defense, supra, 460 F. 2d 1372 (9th Cir. 1971, 1972) remanded for consideration of mootness after Air Force abandoned discharge order and retained Captain Struck in service, 409 U.S. 1071 (1972); Robinson v. Rand, supra; Gutierrez v. Laird, supra.

It held that the discharge for pregnancy regulation rationally served the military needs.

Unquestionably, military readiness and mobility are important concerns. However, the military's legitimate needs and interests are not promoted in a rational manner and perhaps they are not promoted at all by the inflexible regulation commanding ouster of pregnant servicewomen.

In light of the retention option available to pregnant women since early 1971, 13/ it is abundantly clear that the legitimate need of the military can be served by means less drastic than mandatory discharge of pregnant women regardless of their individualized fitness.

13/ A number of servicewomen had invoked this procedure as of the time of trial with no apparent adverse effect upon the Marine Corps. (Tr. pp. 197-199; Defendant's Answer to Plaintiff's Interrog. No. 2(c); App. at 18.) Other branches also have instituted retention procedures whereby the military may waive the discharge of pregnant women. AR 635-200 (21 June 1972) (Army Enlisted Personnel); NPM 3850220(2) (October 1972) (Navy Enlisted Personnel). Most recently the Air Force has further revised its regulations to provide that the status of a pregnant servicewoman is not affected at all on account of pregnancy unless discharge is requested by the woman herself. AFM 39-10 (immediate action changes 19 March 1975) (Air Force Enlisted Personnel). (See Air Force Times, April 2, 1975, at 3, col. 1; App. at 54.)

If readiness and mobility of all servicemembers at all times were in fact necessary in the military, all disabled or potentially disabled servicemembers would be summarily discharged. This is manifestly not the case. Individualized treatment is routinely granted.

Furthermore, courts have noted that pregnancy poses less of an administrative problem than does accident or illness that disables at once, or with far less advance notice, or that requires absence for a longer period than is required for normal pregnancy. See, e.g., Heath v. Westerville Board of Education, supra, 345 F. Supp. at 506; Williams v. San Francisco Unified School District, 340 F. Supp. 438, 445 (N.D. Calif. 1972). The Marine Corps does not peremptorily discharge for physical conditions that develop with little or no warning, or that debilitate far more than pregnancy. See supra at 8-9.

Moreover, the mandatory discharge rule may be detrimental to the promotion of military readiness and mobility. In Robinson v. Rand, supra, the court acknowledged that pregnant servicewomen "by the nature of their jobs, may be called upon to handle emergencies which could

create problems even within the first seven months of pregnancy." 340 F. Supp. at 39. However, the court did not see the "cast them out" rule as a reasoned response to the problem:

> If the Air Force knows that a WAF is pregnant, she can be transferred out of . . . hazardous duty. This will serve the Air Force's interest better than discharging her. So long as a WAF knows that immediate discharge will follow, she is less likely to disclose the fact of her pregnancy . . . . Thus, this particular personnel problem is increased rather than decreased by the regulation. Id. at 40.

As this Court recognized in Green v. Waterford Board of Education, supra, pregnancy treatment is often based upon "old accepted rules and customs," 473 F.2d at 634, not thought through and uncritically accepted. When considered in the light of latter twentieth century reality, attitudes once regarded as chivalrous and solicitous are exposes as baseless and arbitrary. Pregnancy does not typically disable until well into the last trimester, and then only briefly; facilities are readily available for prenatal and postnatal care; child care facilities are provided by the Marine Corps at many bases; appellant was prepared to arrange for child care on her own; military readiness and mobility do not dictate summary discharge of

servicemembers with other disabilities. Nothing indicates the necessity of summary procedures for pregnancy. In short, the vaunted military necessity, which was asserted with respect to pregnant servicemembers and no others, is revealed on inspection to rest on nothing more than "archaic and overbroad" generalizations not tolerated under the Constitution. See Weinberger v. Wiesenfeld, supra, 43 U.S.L.W. at 4396; Stanton v. Stanton, supra, 43 U.S.L.W. at 4451; Taylor v. Louisiana, 43 U.S.L.W. 4167, 4171 (U.S. Jan. 21, 1975).

Finally, appellant Crawford's case presents none of the factors that might render a court reluctant to exercise judicial review or incline it to defer to the fiat of a military commander. See Notes, 86 Harv. L. Rev. 568 (1973); 72 Colum. L. Rev. 1048 (1972). The instant case is far distant from Parker v. Levy, 417 U.S. 733 (1974) in which the Court, citing differences between the military community and the civilian community, and between military law and civilian law, upheld certain provisions of the Uniform Code of Military Justice effectuating military efficiency, loyalty and morale. The Code "regulates aspects of the conduct of members of the military which in the civilian sphere are left unregulated." 417 U.S. at 755 (empha-

sis supplied). See also Orloff v. Willoughby, 345 U.S. 83 (1953), and Burns v. Wilson, 346 U.S. 137 (1953). In contrast to Parker v. Levy, appellant Crawford's case does not involve regulating the conduct of military personnel. Appellant asks only that she be treated in the same manner as the Marine Corps treats all similarly situated servicemembers. Appellant does not seek the institution of new procedures. The "law of [military] obedience" is not at stake in this case. See In re Grimley, 137 U.S. 147, 153 (1890) (cited with approval in Parker v. Levy, supra, 417 U.S. at 751).

Significantly, in Schlesinger v. Ballard, 43 U.S.L.W. 4158 (U.S. Jan. 15, 1975) the Supreme Court did not predicate its decision on the ground that military personnel procedures were untouchable. In Ballard the Court approved a regulatory system granting longer tenure to women Naval officers before application of the "up or out" rule. The system was upheld not out of deference to military regulation, but because the tenure differential had a rational basis (women have fewer opportunities for promotion) and promoted a legitimate objective (giving women a fair opportunity for promotion before discharging them for failure of promotion). Cf. Frontiero v. Richardson, 411

U.S. 677 (1973).

As the Supreme Court said in Levy, a member of the military community continues to enjoy "many of the rights and bears many of the same burdens as do members of the civilian community." 418 U.S. at 751. The right to be treated in accordance with one's actual abilities and capacities is surely one of these. Prejudgment of the kind responsible for the blanket involuntary discharge for pregnancy rule, and perhaps the decision below,[14/] is "dehumanizing to the [women subjected to it] and by its very nature arbitrary and discriminatory." Heath v. Westerville Board of Education, supra, 345 F. Supp. at 505.

14/ Compare the gross assumption made by the court below, based on the sex rather than the life situation of a parent, 378 F. Supp. at 725, with Weinberger v. Wiesenfeld, supra, and Note, 86 Harv. L. Rev. 568, 593-94 n. 164 (1973).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the District Court, direct that judgment be entered in favor of appellant Crawford invalidating her discharge and reinstating her to her former position in the Marine Corps, and order a hearing to determine the pay, benefits and emoluments due appellant to fully compensate her for the wrongful discharge.

Respectfully submitted,

Dated: April 18, 1975

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I HEREBY CERTIFY that two copies of Appellant's Brief and one copy Joint Appendix have been mailed this 18th day of April, 1975, to William B. Gray, Assistant United States Attorney, United States Attorney's Office, Box 10, Rutland, Vermont, Attorney for Appellee.

Kathleen Guthrie

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